FEB 11 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 600

STANLEY CONFORTI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

and

BRIEF IN SUPPORT OF PETITION.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, having been convicted upon a bench trial in the Northern District of Illinois for possessing with intent to pass counterfeit Federal reserve notes in violation of Section 472, Title 18 of the United States Code, sought reversal of that conviction in the Court of Appeals because the trial court's ruling neither required the Government nor permitted the defendant to elicit the identity of two anonymous decoys to whom petitioner was alleged to have passed the counterfeit notes in question. (*Judgment of Conviction,* Tr. 135-6.)

The Court of Appeals held that petitioner was entitled to have these decoys identified, rejecting the Government's

contention that they were "confidential sources" whose identities were privileged, but then held *sua sponte* that petitioner had not adequately asserted or preserved this right. Since at the very outset of the trial, the Trial Court overruled petitioner's objection to testimony that the first of these decoys was "considered a confidential source of the United States Secret Service" (Tr. 17), declared "immaterial" inquiries by petitioner designed to indirectly identify these decoys (Tr. 48 and 52), denied petitioner's motion for dismissal at the close of the Government's case made on the ground that the evidence consisted entirely of testimony as to his alleged transactions with "some unknown persons" (Tr. 99), and denied petitioner's motion for a new trial on the ground, *inter alia,* that "the Court erred in admitting evidence of transactions, dealings and conversations with a person whose identity was known to the Government but not revealed on the trial of this case" (Tr. 104), petitioner now challenges the ruling of the Court of Appeals as so seriously curtailing the processes of appellate judicature in Federal cases as to elicit *certiorari.*

SUMMARY STATEMENT OF THE MATTER INVOLVED.

As appears from the opinion of the Court of Appeals (Tr. 154 to 162), the case against petitioner consisted of the testimony of United States Secret Service Agents that upon each of seven occasions, a secret service agent shared a telephone with one or another of two unnamed and unidentified decoys, that the decoys telephoned petitioner on each of these occasions and made a rendezvous with him upon the public streets of the City of Chicago, and that upon each of seven occasions, secret service agents followed but did not accompany the decoys to the place of rendezvous, where they saw petitioner hand one or the other of the

decoys a package. Each of these packages contained counterfeit Federal reserve notes. Petitioner's fingerprints were found upon the inner side of the newspapers in which two of the packets of counterfeit notes were wrapped. But the presence of the figerprints was wholly and utterly unexplained if, as petitioner contends, evidence of his alleged transactions with the two anonymous decoys was incompetent. (*Facts as stated in the opinion of the Court of Appeals,* at pages 154 to 156.)

At the very inception of the trial, and immediately upon the first occasion when any witness was called upon for testimony relating to the defendant's dealings with either of the unidentified decoys, the following colloquy occurred which is set forth verbatim (Tr. 16, 17):

Direct Examination of Elmer W. Moore by Mr. Ward:

* * * * * *

Q. Are you able to tell whether or not the voice that you heard over the telephone on June 28th, 1950 was the voice of Stanley Conforti, the defendant in this matter?

A. Yes.

Q. Will you kindly tell Judge LaBuy what Conforti said, if anything.

Mr. Klein: That is objected to, if the Court please.

Mr. Ward: What grounds, your Honor?

Mr. Klein: In the first place he has not qualified the witness completely as to when he heard his voice. He says he heard it over the telephone, but he has not said how he heard the telephone conversation, whether he was talking to him, or whether or not he was talking to somebody else, or where it took place. There is nothing here to show where it took place at all.

The Court: I think that would go not to the competency but to the weight and credit to be given to the testimony.

Mr. Klein: If your Honor please, if for example, it had been over a tapped wire it certainly is not admissible, in violation of the Communications Act.

Mr. Ward: *I will ask some further questions, your Honor, so there will be (no) objection at all on the part of counsel.*

The Court: All right.

By Mr. Ward:

Q. Were you the person who conversed with Stanley Conforti, on the telephone on or about June 28th, 1950?

A. I was not.

Q. There was another person, is that correct?

A. That is correct.

Q. *Is that person considered a confidential source of the United States Secret Service?*

Mr. Klein: *That is objected to.*

A. *He is.*

The Court: *Overruled.*

By Mr. Ward:

Q. Describe to Judge LaBuy, please, just how you overheard and how you were able to hear the conversation that took place between Stanley Conforti and the confidential source.

A. I accompanied that confidential source, who is known to me as "54" to a pay telephone located in a restaurant on Madison Street near Keeler, and after approximately,—I think for exactly accuracy I would have to refer to my notes. (Italics ours.)

Whether the alleged decoy was or was not "considered a confidential source of information of the United States Service" could not conceivably be material unless the claim of "confidential source" was intended to be made the basis of a claim of privilege as to the identity of the informers.

Thus, at the trial's very threshhold, the Trial Court made it clear beyond peradventure that he would not compel disclosures of the identity of this decoy. Throughout

the remainder of the trial, this decoy was not identified, described or referred to otherwise than as "No. 54" or "Operator No. 54".

On at least six separate occasions, counsel for the defendant objected to testimony alluding to the alleged decoy as "54", or "Operator 54". (Tr. 23, 27, 30 (twice), 31, 37, 38 and 41.)

The record also shows that the point was squarely presented to the Court below in the defendant's motion for a finding of not guilty made orally at the close of the Government's evidence, counsel stating at the outset of his argument in support of such motion "Now, in this case, your Honor, we have, first, telephone conversations alleged to have been had with the defendant and some unknown person who has not been identified, except by number." (Tr. 99.)

Additionally and finally, we find in the written Motion for New Trial presented to and overruled by the trial Court (Tr. of Record, page 140,) the following most definite statement of the error:

> "6. The Court erred in admitting evidence of transactions, dealings and conversations of the defendant with a person whose identity was known to the government but not revealed upon the trial of the cause."

That the ruling of the Trial Judge was understood to have been that the identity of the decoys might be kept secret, and that direct inquiry thereon was not to be permitted, appears from the very fact that trial counsel for the defendant repeatedly attempted to obtain some indication of who such decoys were by oblique and circuitous inquiries. He asked if No. 54 was a man (Tr. of Record, page 43). He next asked whether he was employed by the secret service at that time. In overruling an objection to this question on the ground that "it would be a viola-

tion of the confidential relation between the Secret Service and the subject * * *" (Tr. of Record, page 44), the Court said, "He may answer *that*." (Emphasis supplied.) Inquiries were then permitted as to whether No. 54 was alive (Tr. of Record, page 48), whether Nos. 54 and 55 were Secret Service Agents, or whether they received compensation from the Government, all without objection by the United States attorney.

The record also reveals the defendant's counsel pursued such indirect inquiries with the purpose of obtaining additional information which might partially identify the decoys by asking when No. 54 was last seen by the witness Moore (Tr. of Record, page 48), whether No. 54 was employed or had any vocation or occupation and whether No. 54 had ever previously worked with the witness (Tr. of Record, page 52), and that objections to all three of these questions were sustained on the ground that the information sought *was immaterial!* Hardly can such have been the case in view of the decision of the Court of Appeals that the defendant was entitled to be informed even as to No. 54's very identity.

It is also noted in connection with the understanding of the ruling of the trial court on this question that the Assistant United States Attorney who tried the case below was on the brief of the appellee, and orally presented the Government's argument to this Court upon appeal. This attorney, who had first hand knowledge of the climate of the trial and the prevailing understanding of the expressions of the trial judge with reference to rulings on the right of the accused to have No. 54 or No. 55 further identified, must obviously have understood this question to have been fairly raised and saved below, since he did not see fit to question the sufficiency of the record for such purpose at any time during the course of the appeal. (Unanswered Petition for Rehearing, Tr. 179.)

Basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28, USCA, Sec. 1254). Rehearing in this cause was denied on January 13, 1953, and within thirty days from the time of the filing of this petition. (Tr. 187).

The Question Presented.

The question presented is:

1. DID THE COURT OF APPEALS, HAVING RECOGNIZED THAT PETITIONER WAS ENTITLED TO IDENTIFY TWO ANONYMOUS ALLEGED DECOYS, DENY SUBSTANSTIAL JUSTICE BY HOLDING THAT HE HAD NOT PROPERLY ASSERTED AND PRESERVED THAT RIGHT?

Reason Relied On for Granting the Writ.

In sustaining a conviction resting entirely upon petitioner's supposed criminal transactions with two alleged decoys whom the district court neither required the Government nor permitted the defendant to identify, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervision."

Prayer for the Writ of Certiorari.

Wherefore, petitioner prays this Court's writ of *certiorari to* review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

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Petitioner.

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BRIEF IN SUPPORT OF THE PETITION.

THE OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported. It appears in the transcript at pages 154 to 162, inclusive.

Reference to Petition for Statement of Grounds of Jurisdiction, of the Facts and of the Questions Presented.

The jurisdictional grounds and the facts are stated and the question sought to be presented is delineated in the Petition for *Certiorari.* Therefore reference to that petition for Statement of the Facts and of the question presented is respectfully made.

SPECIFICATION OF THE ERROR INTENDED TO BE URGED.

I.

The Court of Appeals, having correctly declared that petitioner had a right to have the alleged decoys identified, denied him the substance of that right by erroneously holding that it had not been clearly and fairly asserted.

ARGUMENT.

I.

The Court of Appeals, having correctly declared that petitioner had a right to have the alleged decoys identified, denied him the substance of that right by erroneously holding that it had not been clearly and fairly asserted.

The Government sought to convict and imprison petitioner for alleged criminal transactions with persons whom it refused to name or identify. The Court of Appeals thus denounced this *technique* of criminal prosecution (Tr. 156-58).

> "But the unidentified person, No. 54, involved in this case was more than a mere informer. He was not simply an individual who, knowing that the defendant had committed or was about to commit a crime, communicated that knowledge to the authorities so that the police, acting independently, might then procure evidence of the crime. On the contrary, No. 54 played a part with the defendant in the very transactions upon which the Government relies to prove its case.
>
> "This distinction between one who plays a part in a criminal transaction and one who is a mere informer is well illustrated in *Sorrentino* v. *United States,* 9 Cir., 163 F. 2d 627. There the defendant was charged with an illegal sale of opium to a person whom the Government considered a confidential source. The trial court sustained objections to questions asking his identity on the ground that answers to such questions would violate the privilege as to the identity of in-

formers. The Court of Appeals stated that error, saying, page 628:

'If the person whom Grady called an informer had been an informer and nothing more, his identity would not have been entitled to have his disclosed; but the person whom Grady called an informer was something more. He was the person to whom appellant was said to have sold the opium described in the indictment. Information as to this person's identity was therefore material to appellant's defense, and appellant was entitled to a disclosure thereof.'

"The Government urges that in the instant case the indictment charges, not a sale of counterfeit currency, but only its possession; that, assuming a sale could not have been proved without revealing the identity of the informers, the evidence is ample to support the charge of possession; and that this is particularly so in view of the evidence that on two occasions the defendant's fingerprints were found on the paper in which the currency was wrapped.

"We cannot agree that in this case the fact that the defendant was charged with possession and not sale of counterfeit currency is decisive. The defendant's possession was proved only by evidence of his transactions with No. 54, evidence indicating that he sold and delivered the counterfeit currency to No. 54.

• • • • • •

"In the case at bar the Government relies upon the evidence of defendant's conversations and meetings with the unidentified Government informers or decoys to prove that he possessed counterfeit currency. The defendant denies that he engaged in such transactions.

> If in fact he did not deliver counterfeit currency to these unidentified persons pursuant to the alleged conversations, the charge of possession is not proved. The role which these persons are alleged to have played made them logical choices as witnesses to test the credibility of the Government's testimony. Consequently, the defendant was entitled to inquire and to be answered as to their identity.

Indeed, even where the security of the nation is involved, "the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." (*United States* v. *Coplon*, 185 F. 2d 629, per Judge Learned Hand.)

Again, "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully * * *". (*United States* v. *Andolschek*, 142 F. 2d 503.)

If police officers, secret service agents, and other minions of the criminal law can convict a citizen by accusing him of transactions with persons whom it refuses to name, the right of confrontation is virtually nullified and trial by secret accusation is in accordance with the law of the land.

But the Court of Appeals made the following statement in its opinion (Tr. 159):

> "However, while we agree that the defendant was entitled to be given the identity of No. 54 in an answer to a proper inquiry by him, a search of the record fails to show that any demand was made by the defendant for an answer which would furnish such knowledge."

In the Summary Statement of the Matter Involved, *ante*, we have set forth in substance the efforts that petitioner's counsel made to elicit testimony that would identify, if not by name, at least by clew, these alleged anonymous decoys.

The Court of Appeals regards the point as waived because petitioner's counsel did not ask the secret service agents the names of the decoys. But the trial court had already held material the secret service agents' conclusion that "Operator 54" was "considered a confidential source of the United States Secret Service" (Tr. 17).

Now, it is perfectly obvious that it was wholly immaterial whether the secret service considered "Operator 54" a "confidential source" unless the fact that he was so considered "cloaked him with anonymity."

The trial court further shrouded Operators 54 and 55 in secrecy by refusing to permit counsel even *obliquely* to approach the identity of the decoys. (See *Statement of the Case, ante.*)

Trial counsel for petitioner might have more clearly phrased his objections, phrasing them with the same precision and exactitude which he adopted in his motion for a new trial (Tr. 140). But it is perfectly plain that the trial court intended to sanction the Government's position that the identities of these decoys must be kept a secret from the defendant.

No longer will criminal cases be reversed because technical but insubstantial failures of the Government to comply with all of the niceties of trial practice. Conversely, we submit, convictions resting upon obvious denials of fundamental rights should not be affirmed because trial counsel have not articulated their client's obvious rights as precisely as possible.

Assuming, for the sake of argument, that no objection whatsoever had been made to the introduction of evidence showing the conversations, dealings, or transactions between the petitioner and the anonymous individuals, that the Court expressed no adverse ruling in this regard and that the defendant pursued no effort to determine the identity of either of the unnamed decoys (which assumptions are belied by the record, Point I, *supra,*) it is submitted that, nevertheless, the judgment should be reversed, since it was unnecessary that such an error or defect in the Government's proof be brought to the atttention of the trial judge.

Rule 52 of the Federal Rules of Criminal Procedure provides as follows:

> "*Rule 52. Harmless Error and Plain Error.*
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The error complained of is patently a plain error, that is, a defect affecting a substantial right. The right to be confronted by witnesses and to know one's accuser is a basic and fundamental right, protected by the Sixth Amendment to the Constitution (*United States* v. *Coplon,* (2nd Cir.), 185 F. 2d 629, 637 and 638).

It has been repeatedly held that especially in a criminal case involving the life or liberty of the accused, that federal appellate courts may notice and correct plain errors, though such errors were not challenged.

Miller v. U. S. (10th Circuit), 120 F. (2d) 968, 972 and 973.

Tatum v. *U. S.* (Dist. Col. Court), 190 F. (2d) 612, 614 and 615.

Suhay v. *U. S.* (10th Circuit), 95 F. (2d) 890, 893.
Ayers v. *U. S.* (8th Circuit), 58 F. (2d) 607, 608 and 609.
Gomila v. *U. S.* (5th Circuit), 146 F. (2d) 372, 376.

It is no answer to say that no error exists because no objection and ruling thereon was made in the trial court, since such a construction would render Rule 52 meaningless. *The rule is specifically intended to apply when there has been no objection made.* The error in this case exists independently of any objection or ruling thereon, and is contained in the very act of proceeding to trial and conviction, without disclosing the identity of persons whose alleged activities formed the very basis of conviction. Surely, the preservation of an accused person's right to confrontation by witnesses should not turn upon mere forensic skill.

The only basis upon which the error complained of could be classified as harmless would be on the assumption that the Government agent was telling the truth, *which is the very issue to be tested through learning the identity of the confidential sources.* If these confidential informants do not exist, or if they would not corroborate the Government's testimony, the defendant has been convicted illegally, and the failure to divulge the names of the confidential information is a plain, grievous and fundamental error.

This Court's decision in *Gordon* v. *United States,* not yet officially reported, No. 182 of this Term, recognized the right of a defendant to compel the Government to produce for his use on the trial documents which might reasonably impeach accomplices and to exploit those documents in cross-examination. *In that case, however, at least the Government did produce the accomplices!* In this

case, the Government not only did not produce but refused even to reveal the names of the alleged decoys. If the *Gordon* case was of sufficient importance to elicit *certiorari* and presented so flagrant a record as to require a reversal, the instant case should certainly evoke *certiorari* and reversal.

Conclusion.

For the reasons urged in this Brief, petitioner respectfully asks this Court to grant *certiorari* in this case.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 154-162) is reported at 200 F. 2d 365.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1952, and a petition for rehearing was denied on January 13, 1953 (R. 163-187). The petition for a writ of certiorari was filed on February 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Government witnesses testified to transactions they had seen and heard between petitioner and informants who were identified only as No. 54 and No. 55. The question presented is the propriety of the holding of the Court of Appeals that, although petitioner would have had the right to have such informants identified, his conviction should not be reversed since he had failed to request such information.

STATUTE INVOLVED

18 U. S. C. [1946 ed., Supp. V] 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

Petitioner was charged in the United States District Court for the Northern District of Illinois, under a 12-count indictment with possession of counterfeit Federal Reserve Notes, with knowledge that they were counterfeit and with intent to pass them in violation of 18 U.S.C. 472 (R. 3-10). After waiving a jury trial (R. 13) he was tried before a district judge, found guilty under Counts 4 through 12, inclusive, and sentenced to imprisonment for 10 years on each of these counts the sentence to run concurrently (R. 136, 139).

The evidence may be summarized briefly as follows:

On June 28, 1950, one Moore, a United States Secret Service agent, stayed at a public telephone with a government informer, identified only as No. 54, and listened in on his conversation with petitioner. After No. 54 phoned petitioner at his listed number EStebrook 8-6593, No. 54 asked, "Can you get me one for tonight?" and said "I got 60 for a thousand tonight." Petitioner answered, "O.K. I will see you at 9:00 at the same place." After No. 54 said, "Taylor and Loomis," petitioner answered "Yes" and hung up. (R. 14, 16-18, 110.)

On that evening Moore, in the vicinity of Taylor and Loomis Streets in Chicago, searched No. 54 and another government informer, No. 55, and neither of them had any counterfeit currency on their persons or in their automobile. Moore gave No. 54 $90 in genuine currency. (R. 19-20.) At about 8:20 p.m. another agent saw petitioner leave his home in a 1949 Ford automobile bearing Illinois license number 779-579 (R. 53). At about 9:00 p.m. two other agents saw petitioner leave this same Ford in the vicinity of the designated streets, meet No. 54 in a narrow passageway, give No. 54 a small package, and then drive away (R. 61, 75). After the meeting between petitioner and No. 54, Moore received from the informers a package of counterfeit currency wrapped in newspaper, which was delivered to a fingerprint expert who testified that petitioner's fingerprints were on the newspaper (R. 20-21, 83-86).

Substantially the same procedure was followed by the Secret Service agents and informer No. 54, with No. 55 who usually stayed in the background as his companion, on the other dates involved in the indictment, viz., July 6 (R. 22-26, 59, 61-62, 75-76), July 25 (R. 26-29, 53-54, 55, 77-79), August 9 (R. 29-32, 55-56, 62, 76-77), August 23 (R. 33-35, 56, 63, 77), September 7 (R. 35-37, 56-57, 63-64), and October 11 and 12 (R. 37-40, 57-58, 59-60, 64). One newspaper in which counterfeit currency was wrapped contained three of petitioner's fingerprints on the inside (R. 87-89, 93, 95).

On November 10, 1950 the agents arrested petitioner (R. 41, 64-65). As a basis for identifying petitioner's voice on the telephone, Moore had heard it during the phone calls made by No. 54, and at the time of petitioner's arrest on November 10 (R. 16, 42, 43).

Testifying in his own behalf, petitioner denied that he had possessed any counterfeit money at any time, denied speaking in the telephone conversations disclosed by the Government's case, and disavowed any knowledge of No. 54 (R. 105, 107, 121).

The Court of Appeals sustained the conviction against the contention that it was error for the trial court to admit evidence of petitioner's transactions with No. 54 and No. 55 without requiring the Government to identify such persons. The court ruled that, since the informers were active participants in the transactions upon which the Government predicated its case, petitioner would

have had the right to have them identified fied had he sought such information, but that, since ince the record disclosed no such request, there was no oc no occasion to reverse a conviction fully sustained by d by the evidence (R. 154-163).

ARGUMENT

Petitioner contends that the court below, elow, although correctly recognizing his right to have have the informants,[1] particularly No. 54, identified, dend, denied the substance of that right by erroneously hold holding that petitioner had not asserted it at the trial (Trial (Pet. 10-13). Thus the only point at issue is the the propriety of the holding of the court below that phat petitioner had not sought the right he claims ims was denied him.[2]

For purposes of clarity we set out pertinpertinent parts of the testimony of agent Moore referreferring to No. 54:

> On direct examination (R. 17):
>
> Q. Is that person [No. 54] considered a ed a confidential source of the United States Secres Secret Service?

[1] We do not dispute the holding of the court below (R. ow (R. 156-157) that the instant case comes under an exception to tion to the general rule (see *Vogel* v. *Gruaz*, 110 U. S. 311, 316; *I* 316; *In re Quarles*, 158 U. S. 532, 535) that communications mads made by informers to the Government are privileged. No. 54 was 54 was more than a routine informer, being an active participant with it with petitioner in the transactions upon which the Government pment predicated its case. See *Sorrentino* v. *United States*, 163 F. 2d 3 F. 2d 627, 628-629 (C.A. 9); *Wilson* v. *United States*, 59 F. 2d 390, 2d 390, 391-392 (C.A. 3).

[2] Since the right to disclosure if properly sought was re was recognized by the decision below, the cases relied upon by petiby petitioner (Pet. 12, 15-16) which upheld such right, are not relevar relevant to the narrow question here in issue.

Mr. KLEIN [Petitioner's Attorney]: That is objected to.

A. He is.

The COURT: Overruled.

On cross-examination (R. 43-44):

By Mr. KLEIN: Was he [No. 54] employed by the Secret Service at that time?

Mr. WARD: [United States Attorney]: Your Honor, we will present an objection to that on the ground that we think that it would be a violation of the confidential relation between the Secret Service and the subject and possibly also—I know the Court will not prejudice him, but it may place him in jeopardy, Your Honor.

The COURT: He asked whether he was.

Mr. KLEIN: That is what I asked, yes.

The COURT: He may answer that.

The WITNESS: A. I do not know.[3]

From the foregoing it is clear that the trial court did not rule, as petitioner intimates, that his counsel was foreclosed from inquiring as to the identity of No. 54. The overruling, on Moore's direct examination, of petitioner's general objection to the question as to whether No. 54 was considered a

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[3] In other testimony Moore stated that No. 54 was a man (R. 43); that he did not know if No. 54 was alive at the time of the trial (R. 48); that No. 54 and No. 55 were not Secret Service Agents; and that they did not receive compensation from the Government (R. 51-52). The court sustained prosecution objections as to whether No. 54 was still employed by the Government; the last time the witness saw No. 54 (R. 48); whether No. 54 had an occupation or vocation; and whether the witness did any work with No. 54 prior to that time (R. 52).

confidential source of the Secret Service cannot be expanded into an implicit ruling that the trial court would refuse to permit an answer to the question as to the identity of No. 54; and the record does not indicate that petitioner's counsel so considered it. But even if he did, this impression was certainly dispelled when, on cross-examination, the court overruled the Government's objection to the question as to whether No. 54 was employed by the Secret Service on the ground that this would be a violation of the confidential relation between the Secret Service and the subject. This was an open invitation for petitioner's counsel to inquire directly as to the identity of No. 54. The court below was therefore justified in presuming "that had counsel for the [petitioner] asked the witness Moore the name of No. 54, or where he lived, or any question pertinent to 54's identity, the trial court would have required the witness to answer" (R. 160).[4]

The prosecution had the right to prove its case without using all the witnesses available to it, particularly since the existence of other witnesses was disclosed. *Fielding* v. *United States*, 164 F. 2d 1022, 1023 (C.A. 6); *Jordon* v. *Bondy*, 114 F. 2d

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[4] There is a presumption that if a trial court had been called upon to make a ruling during trial, it would have made a proper one. Cf. *Knable* v. *United States*, 9 F. 2d 567, 570 (C.A. 6). And see R. 161 where the court below observed: "This court, of course, cannot reverse a judgment of the District Court on the theory that the District Court might have erred if it had been required to rule on an objection to a question which sought to establish the identity of No. 54 or No. 55."

599, 602, 604 (C.A. D.C.). The failure to call the informants as additional witnesses did not violate petitioner's right to be confronted with the witnesses against him. Cf. *Dear Check Quong* v. *United States,* 160 F. 2d 251, 253 (C.A. D.C.).

As the court below pointed out (see R. 160), the record indicates that petitioner and his counsel actually knew the identity of No. 54 and No. 55 at all times during the trial. In the oral argument on petitioner's motion for acquittal at the close of the Government's case, the government attorney stated as follows (R. 101): "From the evidence it is obvious that he [petitioner] knows the identity of 54 and 55, and he can subpoena them in if he wishes to bring them into court." Manifestly, if petitioner's counsel did not know the identity of 54 and 55 and considered this of vital importance, he would have so announced, and asked the prosecutor or recalled the witness Moore to ascertain the identity. He did not do so, but proceeded with his defense testimony. Petitioner has thus shown no such prejudice as would warrant the application of Rule 52(b), F. R. Crim. P. to reverse a conviction, amply sustained by the evidence, on petitioner's assumption that he would not have been accorded a right which he did not seek. Cf. *United States* v. *Hirsch,* 136 F. 2d 976, 978 (C.A. 2), certiorari denied, 320 U.S. 759; *Hartzell* v. *United States,* 72 F. 2d 569, 586-587 (C.A. 8), certiorari denied, 293 U.S. 621.

CONCLUSION

The decision below is based on a particular factual situation of no general importance. It was decided under settled legal principles, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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